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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MALCOLM JOE DAVIS,
Petitioner

VS.

STATE OF MISSISSIPPI,
Respondent.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

I. Where State Speedy Trial Act Is Not Intrepreted In Federal Constitutional Terms There Is No Substantial Federal Question And No Appellate Jurisdiction.

II. Were The Two Confessions Given By Appellant Properly Admitted At Trial?

III. Where Appellant Has Failed To Properly Preserve His Record For Review In the Court Below There Is No Substantial Federal Question For Review.

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JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2). Appellee would assert that jurisdiction does not lie as the Supreme Court of Mississippi has not intrepreted Section 99-17-1, Miss. Code Ann., (Supp.1976) in terms of the United States Constitution, but in state constitutional terms only. Certiorari jurisdiction is all that lies in the case and appellant's sham of using a statute does not change this.

STATEMENT OF THE FACTS

On the morning of Friday March 9, 1975, Carol Matherly was raped in her home in the secluded subdivision of Hideaway Estates. She was preparing to go to class at the local junior college after seeing her two children off to school. She was in her bedroom putting on her makeup when she heard the back door open. She put on her glasses and started to go investigate. At the bedroom door she met a man wearing stockings over his head and hands. A struggle insued. Her assailant told her to cooperate and be quite or he would hurt her. She believed him and said she would cooperate.

Davis put a pillow case over Mrs. Matherly's head forced her onto the bed and raped her. He ten led her to the bathroom, where he sat her on the toilet and made her take a douche. When this was complete he told Mrs. Matherly he was sorry. Davis fled, warning Mrs. Matherly to remain in the bathroom for fifteen minutes so he could make good his getaway.

When sufficient time had passed Mrs. Matherly dressed and drove to where her husband worked. Together they went to the police station and reported the rape. A statement was given and Mrs. Matherly was taken to her physician's office.

Mrs. Matherly was able to identify her assailant as Malcolm Joe Davis as he had been to her house on two previous occassions as a washing machine repairman.

Davis was taken into custody later in the day. He was initially questioned around 2:00 p.m. after his rights were given to him and he executed a waiver. He requested an attorney and questioning ceased. Davis was allowed to speak with his attorney over the telephone. Later Davis talked with the sheriff and a deputy and gave a confession after again being read his rights and executing a waiver, even though he had spoken to his attorney.

ARGUMENT

I. WHERE STATE SPEEDY TRIAL ACT IS NOT INTREPRETED IN FEDERAL CONSTITUTIONAL TERMS THERE IS NO SUBSTANTIAL FEDERAL QUESTION AND NO APPELLATE JURISDICTION.

Preliminarily appellee must state that this Court has no jurisdiction to hear this case as an appeal under 28 U.S.C. § 1257(2). 28 U.S.C. § 1257(2) states:

> By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant attempts to invoke this jurisdiction by claiming that the validity Section 99-17-1, Miss. Code Ann. (Supp.1976), has been upheld in federal constitutional terms and is repugnant to that document. Without this sham, as we will show, the only jurisdiction this court can have is certiorari jurisdiction. In either case there is a lack of a substantial question as pertains to Section 99-17-1.

Section 99-17-1, Miss. Code Ann. (Supp.1976), is a state procedural statute dealing with speedy trial. The statute reads:

> Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

There is no federal constitutional requirement that a state have a statute concerning the issue of speedy trial. Where there is not state statute, the test applied for federal constitutional purposes would be the one set forth in Barker v. Wingo, 407 U.S. 514 (1972).

The fact that the Mississippi Legislature enacted a state "speedy trial" act that only applied to the time period between arraignment and trial is not repugnant to the federal constitution.

The intrepretation of this statute is simply a matter of state law over which the State Supreme Court has exclusive jurisdiction. The court below has not intrepreted this statute in a federal constitutional context. In fact the Supreme Court of Mississippi has used the Barker v. Wingo, standard where the period of time between indictment and arraignment have been of any consequence as they did in the case at bar. SEE ALSO: Carlisle v. State, 393 Sol2d 1312 (Miss.1981); Turner v. State, 383 So.2d 489 (Miss. 1980); State v. Davis, 382 So.2d 1095 (Miss.1980). The state met its burden under Section 99-17-1 as Davis was tried in less than 150 days. It is clear, no substantial federal question concerning Section 99-17-1 has been presented that can be addressed under the obligatory appellate jurisdiction of this Court or the discretionary certiorari jurisdiction.

The only issue this Court could have before it for adjudication is the state supreme court's application of Barker v. Wingo, 407 U.S. 514 (1972), and that only by certiorari jurisdiction. The court below properly applied the four pronged balancing test set forth in Barker. The four factors to be considered in this balancing test are:

1. Length of delay.
2. Reason for delay.
3. The defendant's assertion of his right.
4. Prejudice to the defendant.

We find from the record that the total lapsed time between indictment, on March 16, 1979, and trial, on April 10, 1980, was 388 days.

The delay from the March 1979 Term to the November 1979 Term was occasioned by appellant's request for a complete psychological examination. The delay from the November 1979 Term until the April 1980 Term was because of a continuance granted the State because the District Attorney was was authorized no assistants under the existing law was required to be before the grand jury for the entire three week term. The delay was reasonable and constitutionally permissible. There is no substantial federal question presented here.

Tangentially appellant's raised questions concerning the authority to appoint assistant district attorneys, have the attorney general intervene or require the county attorney try the case are without merit here as they have never been presented to the Mississippi Supreme Court. It is well established that this Court will not decide issues raised for the first time, Cardinale v. Louisiana, 344 U.S. 437 (1969) and will not review an issue even though it contains a federal question if there is an adequate State ground that supports the decision of the court. Henry v. Mississippi, 379 U.S. 443 (1965)

II. WERE THE TWO CONFESSION GIVEN BY APPELLANT PROPERLY ADMITTED AT TRIAL.

This issue can be proper for determination only by this Court through its discretionary certiorari jurisdiction not by way of appeal jurisdiction as appellant attempts to assert.

The appellant claims his two confessions were improperly introduced against him at trial thus were Appellant did not take the stand to cite any irregularities in his interrogation during the hearing on the motion to suppress. His only witness was a clinical psycholigist, Dr. Cox, who testified that appellant's will to succeed in this attempt to show involuntariness through some psychological disorder appellant had the burden of meeting the test laid down in Williamson v. State, 330 So.2d 272, 276 (Miss.1976):

> [A] confession will not oridinarily be excluded merely because the person making the confession is mentally weak. Until it is shown that a weak-minded person has divulged that which he would not have divulged had he not been overreached, his voluntary confession is admissible. In Lynum v. Illinois, 372 U.S. 528, 534, 83 S.Ct. 917 920, 9 L.Ed.2d 922,926 (1963), that Court said: "We have said that the question in each case is whether the defendant's will was overborne at the time he confessed."
> [emphasis supplied]

This burden was met by the defendants in both Dover v. State, 227 So.2d 296 (Miss.1969), and Harvey v. State, 207 So.2d 108 (Miss. 1968). A quick look at the facts of those cases, in contrast to the facts presented here, clearly shows that Malcolm Davis was not "overreached." In Dover,the defendant had an I.Q. of 60! And in Harvey, the defendant not only had an I.Q. of 60, he had the mental age of a five year-old!

Here, the psychologist testified that Malcolm Davis had an I.Q. of between 91 and 109, which is normal. And, there were no signs of "organic neurological impairment." The appellant, therefor, is not a "mentally weak" person.

The psychologist did testify that the appellant suffered from anxiety and that he had a "paranoid" and "sociopathic" personality.

It is well-settled that the trial judge must determine the voluntariness of the confession from the totatlity of the circumstances. Lee v. State, 338 So.2d 399, 401 (Miss.1976); Ratliff v. State,317 So.2d 403 (Miss.1975). And, where the defendant claims to have lacked the mental capacity to exercise his will during an interrogation, the determination by the trial court "must necessarily be given great weight." Lee v. State, supra, 338 So.2d at 401. He was in the best position to consider appellant's conduct and capacity, and to observe his demeanor. He is not bound by the psychologist's testimony, United States v. Gray, 421 F.2d 316, 318 (5th Cir. 1970), and his conclusion may not be set aside unless it is manifestly erroneous. Lee v. State, supra; Loper v. State, 330 So.2d 265, 268 (Miss.1976).

The trial court held an extensive hearing on the Motion to Suppress. He observed the appellant over long days of trial. He was in the best position to determine, for example, whether Dr. Cox (the defendant has an I.Q. of between 91-109, but when under stress, his mind is "scrambled eggs"), was to be believed, or whether Sheriff Holliday, ("the man seemed too intelligent"), was to be believed.

The second prong of appellant's attack is the question of whether his confessions were obtained in violation of Edwards v. Arizona, ___ U.S. ___, 68 L.Ed.2d 378, 101 S.Ct. ____ (1981).

As stated by the court below there are parallels between the case at bar and Edwards factually. However the distinctions are even greater. Edwards was never afforded the opportunity to confer with counsel. Davis' attorney, Rex Jones, was telephoned and Davis spoke with him upon request. Questioning ceased.

Edwards told the officers he did not want to talk with anyone and was told that he must talk with them. Davis on the other hand told the Sheriff he had spoken to his attorney and was still willing to talk. The only true factual similarity is the fact that the second interrogation was initiated by the law enforcement officers.

As required in Edwards there was the discreet inquiry into voluntariness and a knowing and intellegent waiver. 406 So.2d at 800.

The situation at bar more closely parallels the case of United States v. Halliday, 658 F.2d 1103 (6th Cir. 1981). In Halliday the Sixth Circuit said:

> In Edwards, the defendant was arrested on a state criminal charge and questioned by the police until the defendant said he wanted an attorney. Questioning then ceased, but the police resumed interrogation the next morning without providing the defendant with counsel. The defendant after being informed of his Miranda rights stated that he was willing to talk, and confessed to the crime. The Supreme Court held that the use of this confession against the defendant at trial violated his right to have counsel present during custodial interrogation. The Court rejected the argument that the defendant waived his right by his response to the second police-initiated interrogation. It held that once an accused expressed a desire to deal with the police only through counsel, he is not subject to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communications with the police.
>
> Edwards emphasizes the necessity of counsel being made "available" or of the defendant having "access" to counsel, 451 U.S. 484-87, 101 S.Ct. at 1885, 1886, rather than holding that once the accused requests counsel he may thereafter be questioned only in the presence of counsel. Here Gallagher had access to two attorneys. Court appointed counsel was made available to him, and in addition he retained and spoke with private counsel. Thus the FBI did not impermissibly initiate a second interrogation after defendant requested counsel.

(Emphasis added) 658 F.2d at 1104-1105.

III. WHERE APPELLANT HAS FAILED TO PROPERLY PRESERVE HIS RECORD FOR REVIEW IN THE COURT BELOW THERE IS NO SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

Appellant claims that a comment made by the assistant district attorney amounted to a comment on the failure of him to testify. The court below held that appellant had not presented a sufficient record on which they could determine the merits of his question. Appellant filed no bill of exceptions nor did he have closing arguments transcribed as a part of the record on appeal. There was a procedural waiver under state law by not presenting a sufficient record for review. Shelton v. Kindred, 279 So.2d 642 So.2d 312 (Miss.1977). This Court will not review an issue even though it contains a federal question if there is an adequate state ground that supports the decision of the state court. Henry v. Mississippi, 379 U.S. 443 (1965). Certainly the failure to present a record sufficient for determination of the issue is adequate state grounds as the court below found.

Appellant had access to his attorney as did Halliday and the Sheriff did not impermissibly initial a second interrogation after Davis requested counsel. Davis was afforded to counsel what his counsel advised him to do has never come out as appellant has never taken the stand even preliminarily to tell us, which is his right. Appellant's confessions were voluntary and there was no violation of Edwards.

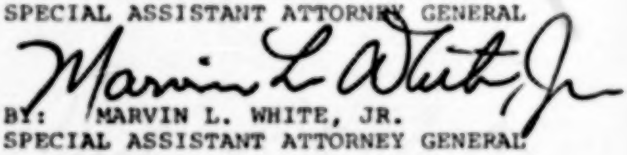
CONCLUSION

For the reasons stated above the appeal should be dismissed or if treated as a petition for certiorari it should be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL



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STATE OF MISSISSIPPI

COUNTY OF HINDS:

I, Catherine Walker Underwood, a member of the Bar of this Court, having been duly sworn, do hereby state that to my knowledge the original and ten (10) copies of the Motion to Dismiss in No. 81-6382, Malcolm Joe Davis v. State of Mississippi were deposited in the United States Post Office in Jackson, Mississippi 39205 on May 24, 1982 a date within the time permitted by this Court for the same. The above was mailed, first class postage prepaid, to the Honorable Michael Rodak, Clerk, United States Supreme Court, Washington, D. C. 20542.

Catherine Walker Underwood
SPECIAL ASSISTANT ATTORNEY GENERAL

SWORN TO and SUBSCRIBED before me this the 24th day of May, A.D., 1982.

Carolyn B. Robertson
NOTARY PUBLIC

My Commission Expires July 6, 1983